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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

NO. 838

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

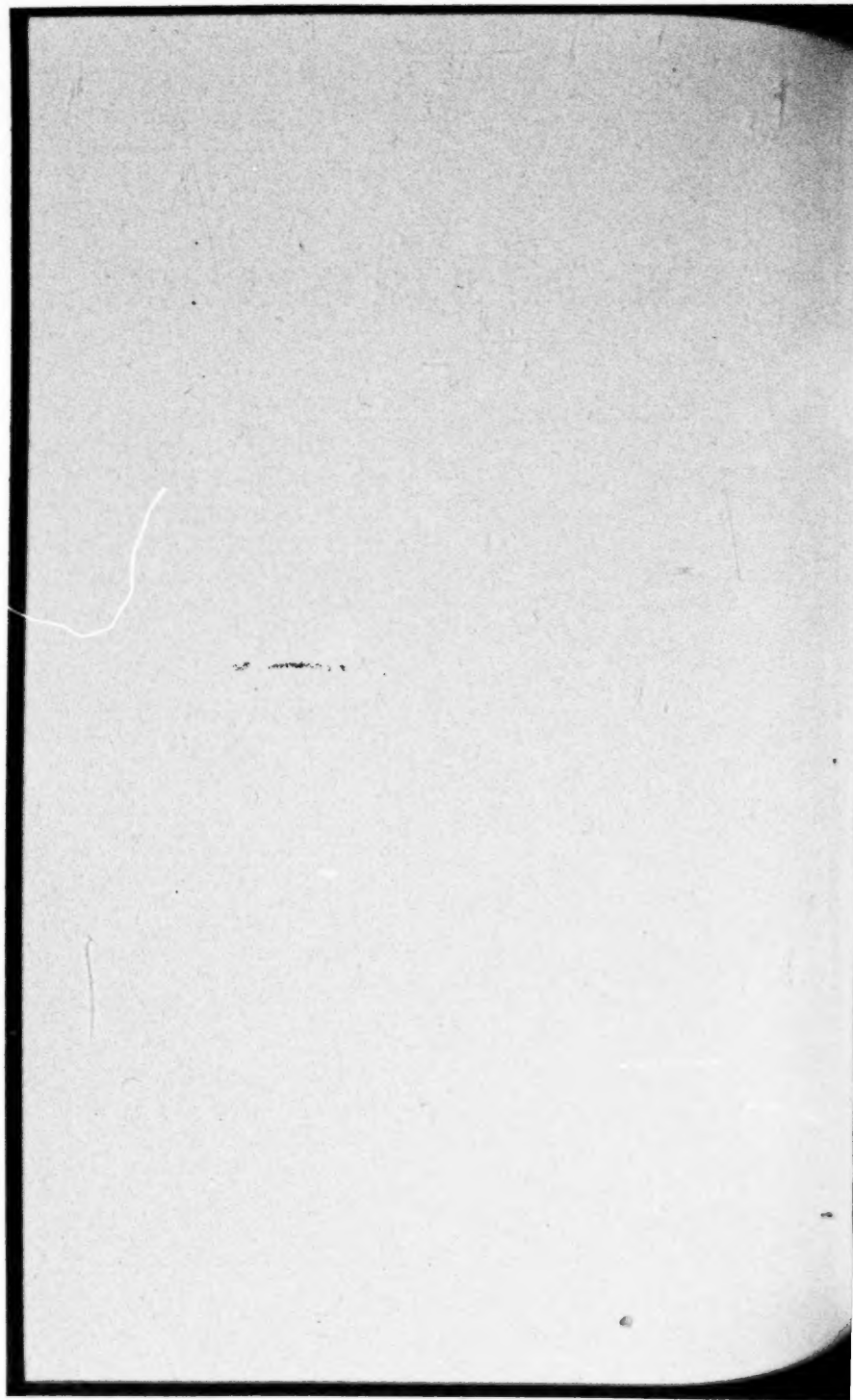
vs.

WILLIAM E. McCARTHY, Administrator of the Estate of
John J. McCarthy, deceased,

Respondent,

RESPONDENT'S BRIEF ON PETITION FOR
WRIT OF CERTIORARI

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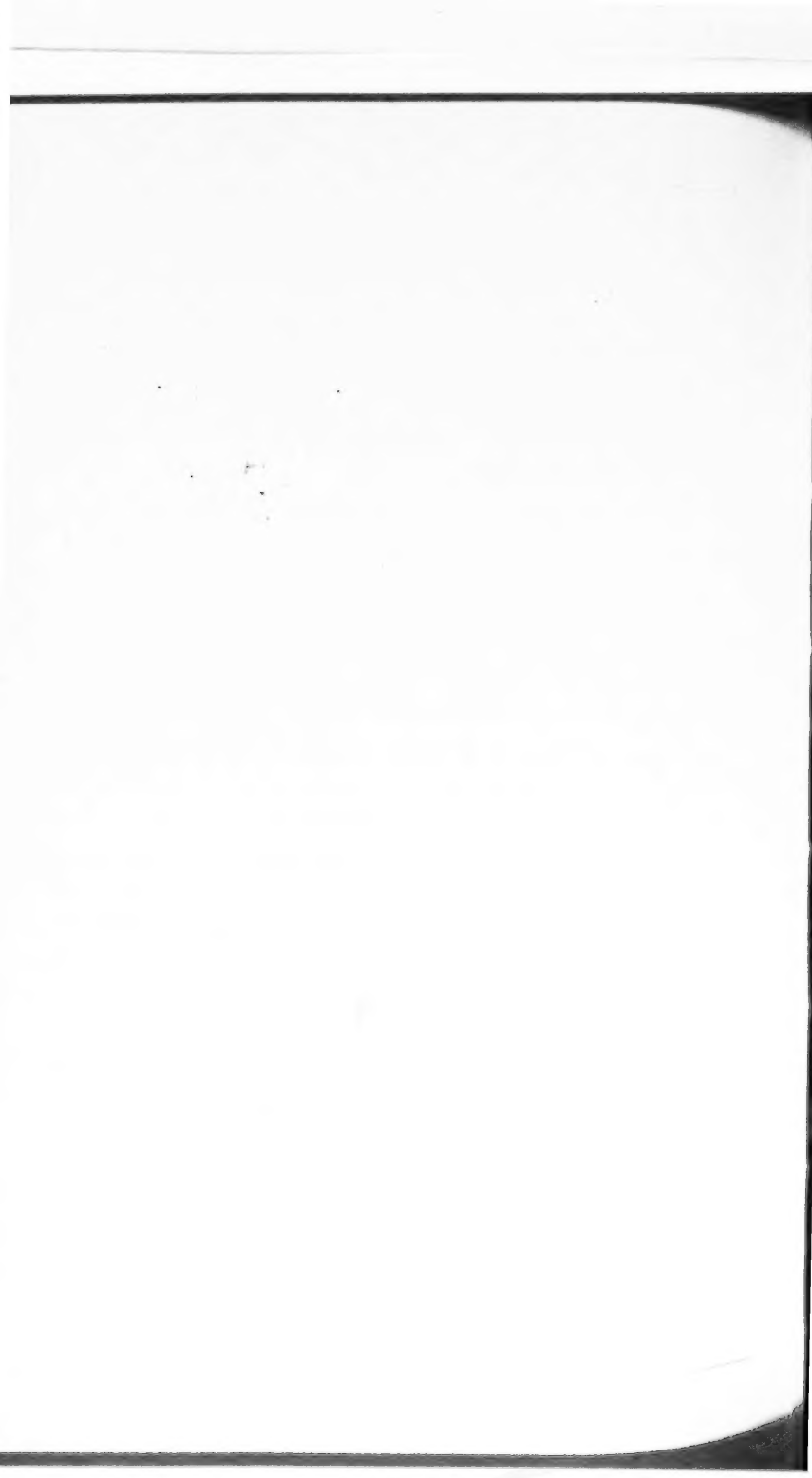


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Jurisdiction and Statutes Involved Admitted

The respondent admits the jurisdiction of the court and that the controversy involves the Statutes of the United States as set forth in the petition.

Denial of Questions Presented

This cause does not present any question of the Circuit Court of Appeals divesting the Jury of its right to determine the facts, or a case where the misconduct of the employee was the sole proximate cause of his injury or the proposition that causes must be tried only by "direct evidence," or a contention that the Safety Appliance Act and the Employers' Liability Act were construed as a Workmen's Compensation Act. The decision of the Circuit Court of Appeals only involved the question as to whether or not

the jury was instructed properly by the District Court, (R. 143) and upon a fair consideration of the record of the cause the Circuit Court of Appeals determined that the District Court committed reversible error in failing to instruct the jury properly as to the law of the case.

Denial of Reasons for Granting the Writ

The decision of the United States Circuit Court of Appeals construed the law applicable to this case in entire harmony with the following decisions of this court, to-wit:

San Antonio & Aransas Pass Railway Company v. Wagner, 241 U. S. 476;

Baltimore & Ohio Railroad Company v. Groeger, 266 U. S. 521;

Tiller v. Atlantic Coast Railroad Co. 318 U. S. 54;

Spokane and Inland Empire Railroad Company v. Campbell 241 U. S. 497;

Lilly v. Grand Trunk R. Co. 317 U. S. 481.

**CORRECTION OF INACCURACIES IN STATEMENT
OF PETITIONER**

The respondent reluctantly but necessarily wishes to point out to the court a certain inaccuracy in the summary statement of the petitioner. On page six (6) of the petition, the petitioner states, "and that shortly before the train arrived at its destination in Chicago the locomotive left the track and turned over, *for cause not directly disclosed by the evidence*, resulting in decedent's death."

The plaintiff, respondent herein, alleged in his complaint, as follows:

Par. 4. "That on the said 16th day of September, 1941, said train was being pulled by a steam locomotive, equipped in addition to other wheels, with a four wheeled engine truck at the front of said locomotive.

That the right front engine truck box on said locomotive became overheated while said train was in operation and while said locomotive was pulling said train at or near 22nd street in the city of Chicago, Illinois, on the tracks of the said Pennsylvania Railroad Company, the right front journal of the front axle of the said engine truck became broken, the said locomotive became derailed and overturned on its left side." (R. 2.)

To this answer the defendant-petitioner answered:

"4. It admits all of the allegations of numbered paragraph four." Such being the issues in this action, it was unnecessary for the plaintiff to prove the allegations of "Paragraph 4" of the complaint, which alleged the cause of the locomotive leaving the track and turning over.

The respondent wishes to point this out to the court as the petitioner uses this as a specific argument in its attempt to secure a review of this case by the Supreme Court. In the summary of its argument near the top of page eight of his petition, the petitioner states again "There is no direct evidence as to the cause of the derailment which resulted in decedent's death."

SUMMARY OF ARGUMENT

The pleadings and admissions were sufficient to prove the cause of the derailment of the locomotive without the necessity of "direct evidence" of that fact.

This cause does not involve an attempt by the Circuit Court of Appeals to invade the province of the jury.

The Circuit Court of Appeals in its reversal of the cause

found that the District Court of the United States for the Northern District of Indiana failed to instruct the jury in accordance with the principles of law which have been plainly enunciated by the Supreme Court of the United States.

ARGUMENT

The petition for a writ of certiorari filed in this cause is based upon two fallacies. They are:

1st. That where an answer admits the allegations of the complaint as to certain matters that there must be "direct evidence" to prove these matters.

2nd. That the Circuit Court of Appeals attempted to invade the province of the jury.

As to the first of these fallacies, the respondent respectfully refers to the summary statement in the petition that the "locomotive left the track and turned over, *for cause not directly disclosed by the evidence*, resulting in decedent's death. In respondent's complaint (R. 2), the respondent alleged:

"Par. 4. That on the said 16th day of September, 1941, said train was being pulled by a steam locomotive, equipped in addition to other wheels, with a four wheeled engine truck at the front of said locomotive. That the right front engine truck box on said locomotive became overheated while said train was in operation and while said locomotive was pulling said train at or near 22nd street, in the City of Chicago, Illinois, on the tracks of the said Pennsylvania Railroad Company, the right front journal of the front axle of the said engine truck became broken, the said locomotive became derailed and overturned on its left side."

The petitioner in its answer stated:

"4. It admits all of the allegations of numbered paragraph four." This made it unnecessary for any evidence being admitted to show why the locomotive left the track

and turned over. In addition to the fact that no proof of these matters was necessary because of the admission in the answer, the trial court in its instructions to the jury stated," (R. 121)

"There are certain stipulations that were entered into by the parties that refer to certain facts that are not denied, and which you may take as proof in this case.

"I shall read these stipulated facts, because, as I said, they are taken as proven and not denied by either party * * * That on said 16th day of September 1941, said train was being pulled by a steam locomotive equipped, in addition to other wheels, with a four wheeled engine truck at the front of said locomotive. That the right front engine truck box on said locomotive became overheated while said train was in operation, and while said locomotive was pulling said train at or near 22nd Street, in the city of Chicago, Illinois, on the tracks of the said Pennsylvania Railroad Company, the right journal of the front axle of said engine truck became broken, and the said locomotive became derailed and turned over on its left side."

Repeatedly in its argument, the petitioner states that there was "no direct evidence" of why the locomotive left the track and turned over, such as "There is no direct evidence supporting the factual conclusions of the Court of Appeals, contrary to the findings of the jury, that "the pony truck broke down," (R. 11). "The jury in the case at bar was free to conclude from the evidence that the actual derailment of the locomotive resulted from causes other than the negligence of defendant in putting a defective locomotive in service or in continuing it in service after it became defective and in concluding decedent's own wilful misconduct in the operation of the locomotive caused it to leave the tracks" (R. 13). "There is no direct evidence of the cause of the derailment, but it does not follow, as the

Court of Appeals apparently assumes, that the jury was limited by law to reaching the conclusion that the derailment was caused by the negligence of the defendant in putting and keeping a defective locomotive in service" (R. 14). "It has been ruled as a matter of law * * * that the District Court erred in leaving to the jury the question whether the presence of the hot box caused the derailment" (R. 17). "Thus the Court finds as a matter of law that the mere presence of the hot box on the pony truck of the locomotive was negligence on the part of the defendant which caused the accident. This finding is not only unsupported by direct proof but it is directly contrary to the finding of the jury" (R. 19).

The petitioner has used this method to induce the court to consider that some independent cause occurred to derail the engine and that the use by the respondent's decedent of the defective locomotive and the violation by the petitioner of the Safety Appliance Act were not the concurrent causes of the death of the respondent's decedent. The petitioner has attempted to weave a claim for the Supreme Court to grant a writ of certiorari with a warf which is destroyed under the light of a consideration of other matters in the record outside of "direct evidence."

As to the second of these fallacies, the respondent contends that there was no attempt on the part of the Circuit Court of Appeals to invade the province of the jury. This contention^{THE PETITIONER} is entirely unwarranted. The Circuit Court of Appeals did not and could not under the state of the record tell a jury how to decide the controversy. There was no attempt or opportunity to attempt to tell a jury how to decide the controversy. The Circuit Court of Appeals merely examined the instructions of the trial court and held that the instructions were erroneous and that the instructions were harmful to the respondent and that the jury under proper

instructions, under the admitted facts in evidence, could have returned a different verdict.

The Circuit Court of Appeals in its disposition of this cause did what the District Court of the Northern District of Indiana, failed to do, that is, carry into effect the decisions of the Supreme Court. In no uncertain terms this court in the case of *Lilly v. Grand Trunk Western Railroad Company*, 317 U. S. 481, 485, in interpreting the Safety Appliance Act, in conjunction with the Federal Employees' Liability Act, stated:

"Negligence is not the basis for liability under the Act. Instead it "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril to life or limb" *Southern R. Co. v. Lunsford*, 297 U. S. 398, 401, *Baltimore & O. R. Co. v. Groeger*, 266 U. S. 521, *Brady v. Terminal R. Asso.* 303 U. S. 10."

The respondent herein tendered an instruction based upon this rule of law (R. 128) which the District Court refused to give to the jury. The respondent objected to the instructions given by the court on the ground that an absolute duty was imposed "on the railroad to furnish safe equipment, and even in the absence of any negligence on its part in furnishing of defective equipment the railroad would be liable. (R. 127.)

The respondent also objected to that part of the instruction which charged with reference to the death of respondent's decedent being caused solely and proximately by his own acts and negligence and independently of negligence on the part of the railroad, that such charge was improper for the reason that there was "no evidence in this

cause of any independent act of negligence on the part of plaintiff's decedent." (R. 127.)

In the case of *Insurance Company v. Baring*, 87 U. S. 159, 161, this court stated:

"It is clearly error in a court, said Taney, Ch. J. to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as the instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in that way by the court. If there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them, as it may induce them to indulge in conjectures, instead of weighing the testimony. *U. S. v. Breitling*, 20 How. 254, 15 L. Ed. 902."

When taken in conjunction with the efforts that have been made by employers in Federal Employees Liability cases to defeat the effects of this act by attempting to construe contributory negligence and assumption of risk into independent acts of negligence, the words of Justice Taney set forth above have additional significance. As this court said in the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 66, "The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and the assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label of the common law."

In this case the District Court attempted to allow the jury to consider the acts of the plaintiff's decedent in attempting to get his train to its destination on time, which under the old theories of law, may have been construed as

contributory negligence or assumption of risk, as an independent act of negligence. The fallacy of this idea is self evident when one considers that the death of the plaintiff's decedent could not have occurred if the defendant had complied with the Safety Appliance Act and had continued to furnish during the entire run from Valparaiso to Chicago equipment which was safe to operate without unnecessary peril to life or limb. The acts of plaintiff's decedent in continuing to operate the train were no different than the acts of any workman who continues to use a tool after he finds the same to be defective. The workman in that case does not assume the risk of using a defective tool; neither did plaintiff's decedent assume the risk of the engine being defective. The defendant attempted to argue that the engineer was the sole person in operation of the Pennsylvania Railroad. The train dispatcher knew that the engine had a hot box (R. 85), he had the power and ability to stop the train, furnish a new engine and completely control its operations (R. 87); he communicated with the power man (R. 90), but there was no evidence that any official of the railroad did anything further about the hot box.

The engineer knew no more of the actual condition of the axle than any other employee, yet the petitioner herein is charged with the sole responsibility for running or not running the train. It was a matter of judgment to be used. If he had stopped his train, delayed his passengers in arriving at their destination, and delayed other trains that followed, and the defect of the axle was not severe, he probably would have been reprimanded. He used his best judgment, in attempting to serve his master, and lost his life thereby. The petitioner compares this to an attempt to commit suicide by running a train into a river after a washout.

The District Court disregarded the Federal Employees'

Liability Act and the Safety Appliance Act and the decisions of the Supreme Court of the United States, ignored the fact that a continuing duty was imposed upon the petitioner to furnish a locomotive safe to operate at all times in the service to which it was put and that the petitioner was liable even though the death of the decedent was caused only in part by the negligence of the petitioner or its failure to discharge the absolute duty which was imposed upon it by the Safety Appliance Act, and construed these Acts of Congress to impose a liability only where the act of the employer was *the* proximate cause of the injury instead of a proximate cause of the injury, contrary to *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 527; *San Antonio & Aransas Pass Ry. v. Wagner*, 241 U. S. 476, 484; *Spokane & Inland Empire Railroad Co. v. Campbell*, 241 U. S. 497, 510.

The Circuit Court of Appeals reviewed the instructions that were given by the District Court and concluded that error was committed in these instructions and reversed the cause.

In the case of *Bailey v. Central Vermont Ry. Inc.*, 319 U. S. 350, 354, Mr. Justice Roberts stated: "I am of the opinion that this case is one of a type not intended by Congress to be brought to this court for review. Actions under the Federal Employers' Liability Act constitute but one category of the great total of actions triable in the Federal District Courts and in the courts of the forty-eight states which come to this court. While the legal principles binding alike on court and jury in such actions are, for the most part settled, the complexes of fact to which these principles are applicable rarely are identical in any two litigations. If, in every case where, peradventure, this court might differ from a lower court in appraising the legal effect of the proofs adduced by plaintiff and defendant, we

independently review the facts to determine whether there was evidence for a jury's consideration, we shall reverse a course founded in over fifty years of history."

The decision of the Circuit Court of Appeals merely put into application the legal principles which the Supreme Court has settled, and the Supreme Court should not, under the veneer that other issues are involved, grant the writ of certiorari requested by the petitioner.

Respectfully submitted,

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